Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

No. 80-254

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

vs.

ALMON BOYD SMITH
Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, First Appellate District of the State of California

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
W. ERIC COLLINS
Deputy Attorney General
RONALD E. NIVER
Deputy Attorney General
NATHAN D. MIHARA
Counsel of Record
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3381
Attorneys for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED

Whether the Fourth Amendment requires that a search warrant be obtained to examine an arrestee's personal effects which police have previously inspected and inventoried in a lawful jail booking process.

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The Petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Three, which was entered in this proceeding on March 27, 1980. The California Supreme Court denied the People's petition for hearing on May 22, 1980.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, which may be found at 103 Cal.App.3d 840, 163 Cal.Rptr. 322 (1980), appears as Appendix A to this petition.

JURISDICTION

The judgment of the California Court of Appeal became final as to that court on April 26, 1980. The California

Supreme Court denied the People's petition for hearing on May 22, 1980. (See, Appendix B.)

Application for an extension of time within which to file a petition for writ of certiorari was made to this Court and granted on July 1, 1980, extending time to and including August 20, 1980. This petition for writ of certiorari was filed prior to August 20, 1980.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On October 23, 1978, the District Attorney of Alameda County filed an information charging respondent Almon Boyd Smith with (1) embezzlement (California Penal Code § 507) and (2) grand theft (California Penal Code § 487). The information further charged that respondent had previously been convicted of two felonies. Respondent pleaded not guilty to both counts and the superior court entered denials on his behalf as to the prior felony allegations on October 24, 1978.

Respondent moved to suppress evidence on November 15, 1978 (California Penal Code § 1538.5). The superior court denied the motion on November 16, 1978.

On January 26, 1979, respondent withdrew his plea of not guilty and pleaded *nolo contendere* to embezzlement (Count I). On the District Attorney's motion, the court dismissed Count II and the prior conviction allegations, suspended the imposition of sentence and placed respondent on probation for three years on condition that he serve one year in county jail.

On March 27, 1980, the California Court of Appeal, First Appellate District, Division Three, reversed the judgment of conviction, holding that once an arrestee's personal effects have been inventoried and inspected during a booking search, they are not subject to a later warrantless search. On May 22, 1980, the California Supreme Court denied the People's petition for hearing. The California Court of Appeal issued the remittitur and entered judgment on May 27, 1980.

STATEMENT OF FACTS

About January 6, 1978, respondent Almon Boyd Smith rented a 1977 two-door blue Ford LTD (license number 617 SCY), from Budget Rent-A-Car in Berkeley, California. He gave his address as Room 47, the Berkeley Plaza Motel, 1175 University Avenue. When the car was not returned, Budget Rent-A-Car filed an auto embezzlement report on the car with the police. Berkeley police officer Michael Stafstrom, an inspector in charge of the auto theft detail, thereafter began the search for respondent.

The manager of the Berkeley Plaza Motel told the officer that respondent and his mother, Zeel Harris, had been renting motel room number 47 but had moved several months previously. The motel manager had seen Smith and his mother in a cream-colored Chevrolet, but their usual car was a blue Ford LTD. Officer Stafstrom's efforts to locate respondent's current address through a national warrant check and business address leads failed.

On February 13, 1978, at about 8:00 a.m., Stafstrom found out that Zeel Harris had been booked in the Berkeley jail the night before. Police had arrested her on a warrant from the Santa Ana Police Department for embezzlement of the 1977 cream-colored Chevrolet. The police had recovered the car at the Berkeley Plaza Motel in space number 47. The keys were not in it.

About an hour later, Officer Stafstrom decided to check the booking form on Ms. Harris to see if it would lead to a current address on her son. The only address listed on the booking form was number 47, 1175 University Avenue, but the officer noticed that Harris' purse was in the Berkeley jail locker. He went to the locker and examined it to see if it would give him a lead to Harris' latest address and thus lead him to her son. He also wanted to check if the keys to the stolen Chevrolet were in there, too.

Inside the purse, Stafstrom found a wallet which had inside both the Chevrolet keys and her driver's license. The license had a southern California address printed on the front, but on the back, in handwriting, showed a change of address to 579 Grizzly Peak, Berkeley. The officer immediately went to Grizzly Peak and there was the Ford

LTD in plain view. The Ford was taken to the police compound.

The superior court denied defendant Smith's motion to suppress evidence[1] but the Court of Appeal held this to be error and ordered the Chevrolet keys, the address on the driver's license and the Ford Ltd suppressed.

REASONS FOR GRANTING THE WRIT

This case raises an important issue involving the extension of the Warrant Clause of the Fourth Amendment to customary police procedures. May the police look through an arrestee's personal effects which are already in lawful police custody following a routine jail booking inspection and inventory procedure?

The People of the State of California submit that once an arrestee's personal possessions have been lawfully examined and inventoried by police during a booking inspection procedure, the arrestee no longer has any legitimate expectation of privacy in those effects as to their subsequent inspection by police. Police should not be required to obtain a search warrant for items which have been already lawfully exposed to their view and are held in their custody.

This case presents an opportunity for this Court to correct the California Court of Appeal's decision which is in conflict with this Court's decision in *United States v. Ed-*

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[1]Defendant Smith had standing to challenge this police examination of his mother's effects under California's vicarious exclusionary rule. *Kaplan v. Superior Court*, 6 Cal.3d 150, 156-162, 98 Cal. Rptr. 649 (1971); contrast *Jones v. United States* 362 U.S. 257, 261 (1960).

wards, 415 U.S. 800 (1973). Contrary to the California Court of Appeal's conclusion, we believe that *Edwards* is sound authority for the proposition that police may, without a warrant, inspect property previously examined and removed at booking and later stored in a property room. To the extent that the decision in *Edwards* is not dispositive of such cases, we ask this Court to define the reach and scope of that decision to preserve police procedures in situations such as that presented in this case.

The subsequent removal, examination and testing of an arrestee's personal effects following a routine booking process is a common occurrence and a critical step to the establishment of the guilt or innocence of the accused. Police nationwide need firm guidelines to judge whether their post-booking procedures in the treatment of an arrestee's effects comports with the demands of the Fourth Amendment.

ARGUMENT

POLICE MAY LAWFULLY EXAMINE THE PERSONAL EFFECTS OF AN ARRESTEE WHICH HAVE BEEN PREVIOUSLY EXAMINED AND PLACED IN POLICE CUSTODY PURSUANT TO A BOOKING PROCEDURE.

At a pretrial hearing, the Alameda County Superior Court denied respondent Smith's motion to suppress evidence of an address and keys that police took from Smith's mother's purse and wallet which were in policy custody following her arrest and booking. The California Court of Appeal reversed the lower court order, holding that the examination of the purse and wallet could not be justified as a part of the booking procedure since the booking process had been completed and that the examination did not fall

within any other exception to the "Warrant requirement" of the Fourth Amendment. The state Court of Appeal further held that because the purpose of the officer's inspection a "second time was to look for at least one item not previously noted (the current address), and items whose evidentiary value had not been previously appreciated (the address and keys)", the inspection was a "search" under the Fourth Amendment and an unconstitutional "intrusion into whatever vestige of privacy remained" in the mother's purse and wallet under the Fourth Amendment. *People v. Smith,* 103 Cal.App.3d at 845, 163 Cal.Rptr. at 325 (1980).

In *United States v. Edwards,* 415 U.S. 800 (1973), this Court declared, "[o]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative process, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial. [footnote omitted]" *Id.* at 807.

The People of the State of California believe that here, "the items in question have been exposed to police view under unobjectionable circumstances, so that no reasonable expectation of privacy is breached by an officer's taking a second look at matter with respect to which [the] expectation of privacy already has been at least partially

dissipated." *United States v. Grill,* 484 F.2d 990 (5th Cir. 1973), *cert. denied* 416 U.S. 989. An illegal search only violates the constitutional rights of those who have "a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois,* 439 U.S. 128, 140 (1978).

Though respondent's mother may well have retained some "vestige of privacy" in her personal effects *as to the general public,* she retained no reasonable or legitimate expectation of freedom from renewed police examination of her wallet and purse which had been previously examined by them and which were in their lawful custody. This conclusion is particularly warranted in the setting of a public jail. There is little reasonable expectation of privacy from police view in a jail. Though it may well be that the Fourth Amendment reaches its apogee in the home (cf. *Payton v. New York,* U.S. , 48 U.S.L.W. 4375 (1980)), such considerations do not apply in a jail and most particularly to small items which have already been examined in detail. Therefore, "for at least a reasonable time and to a reasonable extent", the Warrant Clause of the Fourth Amendment does not apply to post-arrest seizures of an arrestee's effects such as occurred under the circumstances here. *United States v. De Leo,* 422 F.2d 487, 493 (1st Cir. 1970), *cert. denied* 397 U.S. 1037; *United States v. Edwards, supra,* 415 U.S. at 808-809.

Though a search warrant is not required here, it may well be that "second look" examinations of an arrestee's personal effects by police are still subject to the "Fourth Amendment's general proscription against unreasonable searches and seizures." *United States v. Edwards, supra,* 415 U.S. at 808 n.9. The record, however, demonstrates that

the intrusion was neither shocking nor unreasonable in its manner of execution or frequency. As stated by the *Edwards* majority, "[I]ndeed it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." 415 U.S. at 806. Moreover, it is noteworthy that Officer Stafstrom's "second look", as in *Edwards,* occurred on the morning following the arrest and initial booking of the accused. Cf. 415 U.S. at 801-802.

The California Court of Appeal stated that the cases in "other jurisdictions"[2] are in conflict on the issue here and that this Court in *Edwards* did not resolve the question. It is clear that there is some conflict in the Federal Circuits and to the extent that the latter assertion is true, this Court should grant certiorari to settle the matter. Petitioner submits that the reasoning of *Edwards* is compelling and that police were entitled to examine the personal effects of Ms. Harris already in their possession without the necessity of obtaining a warrant.

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[2]Several Federal Circuit Court decisions support our position, including *United States v. Sheehan,* 583 F.2d 30, 32 (1st Cir. 1978), *United States v. Jenkins,* 496 F.2d 57, 73-74 (2d Cir. 1974), *cert. denied* 420 U.S. 925, *United States v. Grill, supra,* 484 F.2d 990 (5th Cir. 1973), *United States v. Oaxaca,* 569 F.2d 518, 523 (9th Cir. 1978), *cert. denied* 439 U.S. 926. See, *contra Brett v. United States,* 412 F.2d 401 (5th Cir. 1969).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Dated: August 11, 1980

GEORGE DEUKMEJIAN
Attorney General of the
State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
W. ERIC COLLINS
Deputy Attorney General
RONALD E. NIVER
Deputy Attorney General
NATHAN D. MIHARA
Counsel of Record
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3381
Attorneys for Petitioner

(Appendices follow)

Appendices

Appendix A

In the Court of Appeal of the State of California
First Appellate District, Division Three

1 Crim. 19411
(Sup. Ct. No. 67239)

People of the State of California,
Plaintiff and Respondent,
vs.
Almon Boyd Smith,
Defendant and Appellant.

[Filed Mar. 27, 1980]

Appellant Almon Boyd Smith was convicted on January 26, 1979, after a plea of nolo contendere, of one count of embezzlement in violation of Penal Code section 507. On March 1, 1979, he was given a suspended sentence of three years during which time he was placed on probation with one year in county jail as a condition thereof. Pursuant to Penal Code section 1538.5 subdivision (m) Smith appeals the trial court's denial of his motion to suppress evidence seized in a post-booking search of his mother's wallet, contending that the search was unconstitutional and a violation of the jail authorities' statutory duty to safeguard her property under Government Code section 26640. As one against whom the fruits of that search were intro-

duced into evidence, Smith's standing to make this challenge is settled under California law.[1]

On or about January 6, 1978, appellant rented a 1977 two-door blue Ford LTD, license number 617 SCY, from Budget Rent-A-Car in Berkeley. The car was never returned. On his rental application, Smith listed his address as 1175 University Avenue, No. 47, a room at the Berkeley Plaza Motel. Budget Rent-A-Car filed an embezzlement report with the police and Officer Michael Stafstrom was assigned to investigate. Some time prior to February 13, 1978, Officer Stafstrom went over to the Berkeley Plaza Motel and spoke to the manager, Don Hubbs. Hubbs told him that appellant and his mother, Zeel Harris, had begun renting room No. 47 in August, 1977, but that they had moved out some time ago. He also told the officer that Smith and Harris had arrived in August in a cream-colored Chevrolet, but that later he had seen them driving a blue Ford LTD.

Until February 13, 1979, all of Officer Stafstrom's efforts to locate Smith and the Ford LTD failed. On that date, however, he learned that Zeel Harris had been arrested the night before on a warrant out of Santa Ana charging her with embezzlement and grand theft of a 1977 cream-colored Chevrolet and that she had been booked into Berkeley city jail. Shortly thereafter, at the prisoners' property facility where Harris' belongings were stored, Officer Stafstrom conducted a warrantless search of her purse, hoping 1) to ascertain her current address in an effort to find Smith and 2) to find the keys to the stolen Chevrolet.

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[1]*People v. Gale* (1973) 9 Cal.3d 788, 793 [108 Cal.Rptr. 852, 511 P.2d 1204]; Kaplan v. Superior Court (1971) 6 Cal.3d 150, 156-162 [198 Cal.Rptr. 649, 491 P.2d 1] and cases cited.

He was successful on both counts. Inside the purse was a wallet which contained the Chevrolet keys and Harris' driver's license. On the back of the license was written an address on Grizzly Peak Boulevard. The officer saw the Ford LTD in plain view at that address and had it seized and towed.

Smith seeks to suppress the Ford LTD on the grounds that Stafstrom's search did not fall within any recognized exception to the warrant requirement. His appeal thus presents a question novel to this jurisdiction: once an arrestee's personal effects have been inventoried and inspected during a booking search, do they remain "fair game,"[2] that is, subject to warrantless searches without probable cause[3] for the period of incarceration?

Whenever one embarks on any warrantless search analysis, one must keep the following words uppermost in mind: "'[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 454-55 [29 L.Ed.2d 564, 576, 91 S.Ct. 2022]; *Katz v. United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 585, 88 S. Ct. 507].)

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[2]See discussion of this subject in 2 LaFave, Search and Seizure, section 5.3(b), hereinafter referred to as LaFave.

[3]Respondent does not contend that Stafstrom had probable cause to search Harris' purse. The district attorney argued at trial that Stafstrom was entitled to search without it.

The so-called booking search exception has been upheld repeatedly, usually on a theory that it is really a search incident to arrest with an inconsequential time lag. (*People v. Ross* (1967) 67 Cal.2d 64, 70-71 [60 Cal.Rptr. 254, 429 P.2d 606], reversed on other grounds *sub nom. Ross v. California* (1968) 391 U.S. 470 [20 L.Ed.2d 750, 88 S.Ct. 1850]; *People v. Superior Court (Murray)* (1973) 30 Cal.App.3d 257, 263 [106 Cal.Rptr. 211] and cases cited; *see, People v. Maher* (1976) 17 Cal.3d 196, 201 [130 Cal.Rptr. 508, 550 P.2d 1044].) This was the analysis used by the Supreme Court in *United States v. Edwards* (1973) 415 U.S. 800, 803 [39 L.Ed.2d 771, 775-776, 94 S.Ct. 1234].

Edwards was based on the following facts. Defendant had been arrested late at night on suspicion of having attempted to break into a post office. He was taken to the local jail facility and locked into a cell, but because the authorities had no jail garb immediately available, he was allowed to retain his clothing overnight. Investigation at the post office revealed that the instrument used to pry open the window had left some paint chips on the sill. Edwards' clothes were taken from him the next morning, examined, and found to contain paint chips matching those found at the scene. The chips were admitted into evidence.

The *Edwards* majority found in that case that the administrative booking process incident to custodial arrest *had not ended* by the time Edwards was put in his cell. (415 U.S. at p. 804 [39 L.Ed.2d at p. 776].) It therefore felt constrained to hold that seizure of his street clothes involved "no more than taking from respondent the effects *in his immediate possession* that constituted evidence of a crime. This was and is a normal incident of a custodial

arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of arrest or immediately upon arrival at the place of detention." (415 U.S. at p. 805 [39 L.Ed.2d at p. 777]; *italics* added.)

A clear distinction may thus be drawn between *Edwards* and the case at bar. There is no dispute that here the booking process had been wholly completed. In addition, Harris' wallet was no longer in her possession but had been safely stored in a locked container.[4] It is settled that search incident to arrest is limited to the arrestee's person and "the area from within which he might gain possession of a weapon or destructible evidence." (*Chimel v. California* (1969) 395 U.S. 752, 763 [23 L.Ed.2d 685, 694, 89 S.Ct. 2034]; *People v. Flores* (1979) 100 Cal.App.3d 221 [160 Cal.Rptr. 839].) In *Edwards* this requirement was satisfied. Here it was not.

We express no opinion regarding the continued validity of non-consensual booking searches after *Chadwick*[5] and its progeny. It is unnecessary that we do so, since even if the initial intrusion into Harris' purse can be upheld as coming within a booking search exception, Officer Stafstrom's search cannot be similarly characterized.

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[4]LaFave suggests that *Edwards*' reliance on the incident to arrest exception is misplaced and that the case can better be explained as involving a plain view seizure, since respondent's clothes were still on his back. (LaFave, *supra* at p. 314.)

[5]*U.S. v. Chadwick* (1977) 433 U.S. 1 [53 L.Ed.2d 538, 97 S.Ct. 2476]. See also *People v. Minjares* (1979) 24 Cal.3d 410 [153 Cal. Rptr. 224, 591 P.2d 514]; *People v. Pace* (1979) 92 Cal.App.3d 199 [154 Cal.Rptr. 811]; *People v. Flores* (1979) 100 Cal.App.3d 221, 232 fn. 5 [160 Cal.Rptr. 839] (dictum). Cf., *People v. Rucker* (1980) 26 Cal.3d 368 [162 Cal.Rptr. 13, 605 P.2d 843], permissible scope of inquiries during booking procedure.

As with other exceptions to the warrant requirement, any authorization to search pursuant to the booking process must be limited to " 'the circumstances which rendered its initiation permissible.' " (*Chimel v. California* (1969) 395 U.S. 752 [23 L.Ed.2d 685, 89 S.Ct. 2034].) Here all purposes which might underlie a booking search exception had been fully served the night before the warrantless search at issue here. Indeed, Officer Stafstrom himself testified that his only reason for conducting the second search was to look for evidence. Therefore, even assuming that the first intrusion was lawful, since Stafstrom did not conduct a booking search, we must find another exception to the warrant requirement in order to justify his actions.

The only argument to be made is that Harris' privacy interest in the items seized by Stafstrom was so dissipated by the first search as to render the "second look" inconsequential, i.e., *not a search*, from the standpoint of the Fourth Amendment.

Cases in other jurisdictions in which the issue has been considered are in conflict.[6] The question is not settled by *Edwards*.[7] We conclude that since the officer's purpose in

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[6]See *United States v. Jenkins* (2d Cir. 1974) 496 F.2d 57, cert. den. 420 U.S. 925 [43 L.Ed.2d 394, 95 S.Ct. 119]; *United States v. Grill* (5th Cir. 1973) 484 F.2d 990. Contrast, *Brett v. United States* (5th Cir. 1969) 412 F.2d 401; *People v. Trudeau* (1971) 385 Mich. 276 [187 N.W.2d 890].

[7]Despite dictum that it would permit retrieval of property seized on booking, but thereafter stored in the property room. (415 U.S. 800, 807 [39 L.Ed.2d 771, 777-778]. LaFave at p. 319.) It is not clear whether the *Edwards* court was referring exclusively to property whose evidentiary value is recognized at the initial search stage or whether it would also permit a second, or fiftieth, look at property which originally appeared innocuous.

inspecting Harris' purse and wallet a second time was to look for at least one item not previously noted (the current address), and items whose evidentiary value had not been previously appreciated (the address and keys), the inspection involved an intrusion into whatever vestige of privacy remained to Harris and thus did constitute a search.

To declare that arrestees have no further privacy interest in their personal property once it is subjected to a booking search would mean that all accused persons, whether subsequently found innocent or guilty, would be subject to having their effects rummaged through at will during the entire period of their incarceration. This is a result we cannot condone.

We find that the warrantless search here was unlawful and the evidence secured as a result of the search should have been suppressed. The judgment of conviction is also reversed. (*Wong Sun v. United States* (1963) 371 U.S. 471 [9 L.Ed.2d 441, 83 S.Ct. 407].)

CERTIFIED FOR PUBLICATION.

Takei, J.*

I CONCUR:

White, P.J.

I concur in the judgment.

Feinberg, J.

1 Crim. 19411

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*Assigned by the Chairperson of the Judicial Council.

Appendix B

Order Due
May 23, 1980

ORDER DENYING HEARING
After Judgment by the Court of Appeal
1st District, Division 3, Crim. No. 19411

In the Supreme Court of the State of California

In Bank

[Filed May 22, 1980]

People
v.
Smith

Respondent's petition for hearing DENIED.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

/s/ Bird
Chief Justice

No. 80-254

In the Supreme Court
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Supplement to Petition

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
W. ERIC COLLINS
Deputy Attorney General
NATHAN D. MIHARA
Counsel of Record
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3381
Attorneys for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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Respondent.

Supplement to Petition

On July 22, 1980, Justice Rehnquist granted our application for stay "pending proceedings in the California Courts to determine whether the Superior Court of California, Alameda County, has authority to reinstate the action previously dismissed." The California Court of Appeal decided that issue in the negative by written opinion filed on January 27, 1981.

Under the California Rules of Court, Rule 24, subdivision (a), the Court of Appeal decision is not final until 30 days from the date of filing. (See Appendix A). Then and only then are we allowed to seek review in the California Supreme Court. This must be done within 10 days thereafter. California Rules of Court, Rule 28, subdivision (b). (See Appendix B). The period during which our petition may be filed begins on February 26, 1981, and ends on March 8, 1981. We are currently preparing our petition for hearing to the California Supreme Court and will file a copy of that petition with this Court also.

Respondent acknowledges that we have already informed him of this intention but nevertheless seems to request that this Court should now act on his assertion of mootness. The case is not moot for the simple reason that the California litigation is not yet final. Action by this Court is neither required nor desirable until the California Supreme Court finally rules on our claim that the purposeful but inadvertent assertion by the public defender to the trial court that this case was ended does not justify the dismissal so obtained.

The petitioner therefore requests that the respondent's request in his letter of January 29, 1981, that this Court dismiss the petition for certiorari before the California litigation becomes final be denied.

The petitioner will inform this Court of the progress of the California litigation.

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
W. ERIC COLLINS
Deputy Attorney General
NATHAN D. MIHARA
Counsel of Record
Deputy Attorney General
Attorneys for Petitioner

(Appendix follows)

Appendices

Appendix A.

Rule 24. Decision of Reviewing Court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

Appendix B.

Rule 28. Hearing in Supreme Court[1]

(b) [Time for filing petition] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When such copy is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
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SUPREME COURT, U.S.

NO. 80-254

STATE OF CALIFORNIA, Petitioner

vs.

ALMON BOYD SMITH, Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondent, Almon Boyd Smith, by and through his counsel, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of Respondent in support of this motion is attached hereto.

DATED: November 10, 1980

PETER R. SILTEN
Deputy State Public Defender

Counsel for Respondent

10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALMON BOYD SMITH,
Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, ALMON BOYD SMITH, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to pre-pay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. The nature of said cause is briefly stated as follows:

On January 26, 1979, after my motion to suppress evidence was denied, I entered a plea of nolo contendere to embezzlement of an automobile, a violation of

California Penal Code section 487. On March 1, 1979, I was placed on three years' probation. One of the conditions of my probation was that I serve one year in the county jail. On March 27, 1980, the California Court of Appeal, First Appellate District, Division Three, reversed my conviction on the ground that certain items taken from my mother were illegally seized.

Almon Boyd Smith
ALMON BOYD SMITH

State of California)
) ss.
County of Los Angeles)

On November 7, 1980, before the undersigned, a Notary Public for the State of California, personally appeared ALMON BOYD SMITH, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

Beatriz R. Bland
BEATRIZ R. BLAND

NO. 80-254

IN THE SUPREME COURT

OF THE

UNITED STATES

RECEIVED
NOV 12 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALMON BOYD SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT, DIVISION THREE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUIN DENVIR
State Public Defender

PETER R. SILTEN
Deputy State Public Defender

1390 Market Street, Suite 425
San Francisco, California 94102
Telephone: (415) 557-1600

Counsel for Respondent

12/

QUESTIONS PRESENTED

Does this Court have jurisdiction to entertain a petition for writ of certiorari in a criminal case dismissed by the trial court on motion of the prosecutor?

Once an arrestee's personal effects have been inventoried and inspected during a "booking" search, do they remain subject to warrantless searches without probable cause for the period of incarceration?

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NO. 80-254

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALMON BOYD SMITH,

Respondent.

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent, Almon Boyd Smith, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's decision in this case. That decision is reported at 103 Cal.App.3d 840, 163 Cal.Rptr. 322 (1980).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the provisions relevant to this case.

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case with the following additions:

On July 10, 1980, respondent's case was called in the superior court. At that time, the district attorney requested that the case against respondent be dismissed under California Penal Code section 1385.[1/] The superior court granted the district attorney's request. Thereafter, on July 16, the district attorney asked that the criminal proceedings against respondent be reinstated. Over respondent's objection, the superior court reinstated the charge against respondent.

On July 22, 1980, respondent filed in the California Court of Appeal a petition for a writ of mandate and/or prohibition challenging the superior court's order of July 16, 1980, as being void and of no effect whatsoever.

On September 11, 1980, the Court of Appeal issued an alternative writ of mandate (App. A).

On October 21, 1980, the Court of Appeal heard argument in this matter. We are now awaiting decision.[2/]

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1. California Penal Code section 1385 provides in relevant part:

> "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

2. As recognized by Mr. Justice Rehnquist's conditional stay order in this case, this action has a direct bearing on the status of respondent's case in this Court. Should the California Court of Appeal conclude that the superior court's order of July 16, 1980, reinstating respondent's case, is void, then the superior court's dismissal of respondent's case entered on July 10, 1980, stands and, as far as this Court is concerned, respondent's case is moot.

STATEMENT OF FACTS

On February 13, 1978, at 8:00 a.m., Officer Michael Stafstrom of the Berkeley Police Department, learned that Ms. Zeel Harris had been arrested and booked into the Berkeley City Jail the night before on an arrest warrant from the Santa Ana Police Department charging grand theft of an automobile, a 1977 Chevrolet, and that the automobile involved, but not its keys, had been recovered.

Officer Stafstrom was interested in Ms. Harris because he was looking for her son (respondent) who was wanted on a complaint of auto embezzlement involving a 1978 blue Ford, license number 617 SCY. Officer Stafstrom did not kn w where respondent or the Ford were.

Shortly after nine o'clock the same morning, Officer Stafstrom, without a warrant, obtained Ms. Harris' personal property from the prisoner's locked property room in the Berkeley City Jail. He opened Ms. Harris' purse and searched through it until he located the keys to the stolen automobile. He then rummaged through her wallet, took out her driver's license and found written on the back of it the address 579 Grizzly Peak Boulevard in Berkeley.

On the same day, Officer Stafstrom, still without a warrant, went to 579 Grizzly Peak Boulevard, Berkeley, where he found a blue Ford, license number 617 SCY.

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REASONS FOR DENYING THE WRIT

I

THE PRESENT CASE IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT IS MOOT

As previously noted, the case against respondent was ordered dismissed by the superior court. This dismissal was entered pursuant to the request of the district attorney. Thereafter, once the district attorney realized that the California Attorney General wished to pursue respondent's case in this Court, he went back to the superior court and asked that respondent's case be reinstated. On July 16, 1980, over respondent's objection, the superior court reinstated respondent's case. Subsequently, respondent filed in the California Court of Appeal a petition for a writ of mandate and/or prohibition challenging the superior court's reinstatement of his case. On September 11, the California Court of Appeal issued an alternative writ of mandate commanding the superior court to vacate its order of July 16 reinstating respondent's case, or to show cause why it had not done so. Argument was heard on October 21, 1980, and we are now awaiting the Court of Appeal's decision.

The decision of the California Court of Appeal in Smith v. Superior Court (People), 1 Civil 50184, is of the utmost importance to the case before this Court. If the California Court of Appeal decides that the superior court was without any power to reinstate respondent's case, then the superior court's order of July 10 stands and respondent's case is dismissed. This would render the case before this

Court moot and require a dismissal. Williams v. Simons, 355 U.S. 49 (1957).

> "This Court is empowered by the Constitution to decide cases and controversies. [Citation.] A cause that has become moot is not a case or controversy in the constitutional sense. [Citation.] We cannot underscore this principle too heavily. We have no business in giving any expression of views on the merits, even in squinting one way or another." Williams v. Simons, supra, at 57-58 (Douglas, J., concurring).

Under the circumstances, this Court should take no action until the California Court of Appeal renders its decision in Smith v. Superior Court (People), supra, which, under the provisions of the California Constitution should occur on or before January 19, 1981 (see Cal.Const., art. VI, § 19).

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II

THE PRESENT CASE IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT DOES NOT CLEARLY PRESENT A FEDERAL QUESTION

In finding that the search in the present case was unlawful, the California Court of Appeal cited not only this Court's decision in Chimel v. California, 395 U.S. 752 (1969), but also its own prior decision in People v. Flores, 100 Cal. Rptr. 839 (1979), which in turn rests upon California Constitution, article I, section 13.[3/] People v. Flores, supra, 100 Cal.App.3d at 229, 160 Cal.Rptr. at 844.

Under these circumstances, respondent's case was decided on state law grounds. Should there be any uncertainty on this score, at most the present case should be returned to the California Court of Appeal so that it may clarify whether its decision is grounded on federal or state constitutional grounds, or both. California v. Krivda, 409 U.S. 33 (1972). Of course this would be necessary only in the event that the present case is not moot.

If respondent is correct that his case was decided on state constitutional grounds, then it would be inappropriate for this Court to grant certiorari review. See Jankovich v. Toll Road Comm'n., 379 U.S. 487, 489 (1964).

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3. California Constitution, article I, section 13, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

III

THE CALIFORNIA COURT OF APPEAL'S DECISION IN THIS CASE IS CORRECT

A. The Warrantless Search of Ms. Harris' Personal Property Stored In Jail Was Unlawful Because It Occurred After Booking Had Ended.

The Fourth Amendment's warrant requirement must be satisfied in every case where exigent circumstances do not exist. In California, that constitutional principle is reflected in the rule placing upon the prosecution the burden of establishing the legality of any search not conducted pursuant to a warrant. People v. Maher, 17 Cal.3d 196, 203, 130 Cal.Rptr. 508, 514 (1976).

> "As the court in Katz [Katz v. United States, 389 U.S. 347 (1967)] explained: '. . . this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," [citation.], for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ."' [citations.]." Lorenzana v. Superior Court, 9 Cal.3d 626, 639, 108 Cal Rptr. 585, 595 (1973). See also Arkansas v. Sanders, 442 U.S. 753, 760 (1979).

In a few well-defined situations, exceptions are made to the rule requiring a warrant. One such exception allows warrantless searches of property if there are exigent circumstances, "such as danger to law officers, or the risk of loss or destruction of evidence." Arkansas v. Sanders, supra, 442 U.S. at 759. California law also recognizes another exception: the warrantless booking search. The booking search is made contemporaneously with entry into jail and

has a three-fold purpose: (1) to maintain jail security, (2) to search for weapons, contraband, means of escape and evidence of the crime for which the person has been arrested, and (3) to store and safeguard the arrestee's personal property while he is in custody. Cal. Gov. Code § 26640; People v. Maher, supra.

Officer Stafstrom's search of Ms. Harris' property does not fall within either the exigent circumstances or booking search exception.[4/] Once her purse was put in the property locker, the police officers were no longer in any danger, nor was there any chance that evidence would be lost or destroyed. The booking search and inventory process had been completed during the night before Officer Stafstrom came on duty. Once that process had been completed, the police had no justification to take a second look without getting a warrant.

In all the cases that have upheld a search of an arrestee's property on introduction into jail, the booking period was not yet over when the search was made. In the leading federal case of United States v. Edwards, 415 U.S. 800 (1974), the police searched defendant's clothing the morning after he was placed in jail. But the court there noted that, "the normal process incident to arrest and custody had not been completed when Edwards was placed in his cell on the night [before the search]" (id., at 776).

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4. Note that although appellant's own property is not involved in this case, he has standing under California law to assert the Fourth Amendment rights of Ms. Harris and the violation thereof. (People v. Gale, 9 Cal.3d 788, 793, 108 Cal.Rptr. 852, 856 (1973).

In Edwards, the police allowed defendant to keep his own clothing overnight since it was difficult at that hour to get him substitute clothing. The police had probable cause to suspect that his clothing might contain evidence of the crime for which he was arrested. They therefore merely delayed, for convenience sake, the booking search that they were entitled to conduct initially. The police were simply completing the booking process; they were not coming back to take a second look for something they neglected to find before locking away his goods.[5/]

In the present case the usual reasons justifying police in performing a booking search (to prevent introduction of contraband or weapons into jail, to discover fruits of the crime) do not provide a compelling justification for the police to have taken a second look at Ms. Harris' property. Certainly once the police had all her belongings safely locked in the jail property room, there was no danger that weapons or contraband could be introduced to other inmates. There was still the possibility of discovering the fruits of a crime, but if the police genuinely suspected that there was something they had missed on the initial booking search, there was no reason why they could not have obtained a warrant for a second look.

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5. As the Court of Appeal noted, one commentator suggests that Edwards' reliance on the incident to arrest exception is misplaced and that the case can better be explained as involving a plain view seizure, since Edwards' clothes were still on his back. 2 LaFave, Law of Search and Seizure, section 5.3(b), p. 314. (See Appendix to Petition for Certiorari, A-5)

B. Once Ms. Harris' Property Was Reduced To Exclusive Police Control There Were No Longer Any Exigent Circumstances Excusing The Police From Obtaining A Warrant Before The Search

Courts have established the rule that once an item of the arrestee's property comes under an officer's exclusive control, an immediate search is no longer necessary and a warrant must be obtained for a search of the item unless exigent circumstances dictate an immediate search. United States v. Chadwick, 433 U.S. 1 (1977). In Chadwick this Court found that there was no exigency dispensing with the warrant requirement where federal agents seized a locked footlocker from defendant's car and searched it without a warrant three hours later, at headquarters.

> ". . . warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from arrest,' * * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." Id., at 15. See also United States v. Schleis, 582 F.2d 1166, 1172 (8th Cir. 1978).

In United States v. Jones, 317 F.Supp. 857 (E.D. Tenn. 1970), a federal case whose facts are almost identical to those in the present case, a jailer searched through a prisoner's billfold without a warrant after the billfold had been taken from the prisoner's immediate control and come into the control of the jailer (Mr. Ward).[6/] The district

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6. Jones dealt with a billfold. Other cases have held there is an expectation of privacy in a footlocker, United States v. Chadwick, supra, 433 U.S. 1, a briefcase, United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978). Certainly, the expectation of privacy in a purse is at least as great as that in a tote bag or billfold. What the court in Arkansas v. Sanders, supra, 442 U.S. at 762, said of luggage applies to purses since they are "a common repository for one's personal effects, and therefore [are] inevitably associated with the expectation of privacy."

court there held that

> "There was no justification for Mr. Ward's searching through Mr. Jones' billfold without a search warrant after the billfold was no longer 'within his immediate control.' Chimel v. California (1969) 395 U.S. 752, 763. After it departed Mr. Jones' immediate control and went into the immediate control of Mr. Ward, Mr. Jones could not have extracted therefrom any dangerous weapon, anything that Mr. Ward reasonably deemed necessary to the latter's safety or the public safety, anything detrimental to Mr. Jones' safekeeping; or any instruments or evidence of the crime for which Mr. Jones was being held in custody as might have been of use as evidence on the trial of the offense for which the arrest was made, or might have enabled Mr. Jones to escape, such as weapons, tools, keys and the like." Id., at 858.

In Brett v. United States, 412 F.2d 401 (5th Cir. 1969), police conducted a warrantless search of defendant's clothing three days after it had been put in the prisoner's property room for safekeeping. Since Brett was already in police custody, he could not have gained access to his clothing. The clothing, therefore, was not in danger of being removed elsewhere, or of being destroyed, and it was not available to the defendant as a source of obtaining escape weapons. The court ruled that the search was invalid, stating that

> "The fact that the police have custody of a prisoner's property for the purpose of protecting it while he is incarcerated does not alone constitute a basis for an exception to the requirement of a search warrant." Id., at 406.

Other jurisdictions have considered the issue of whether such a post-booking or post-arrest search requires a warrant, and these jurisdictions have concluded that a warrant is required. See, e.g., Faubion v. United States, 424 F.2d 437 (10th Cir. 1970) (suitcase); United States v. Jackson, 576 F.2d 749 (8th Cir. 1978) (attache case); United

States v. Marchand, 564 F.2d 983 (2nd Cir. 1977) (wallet); United States v. Berry, 560 F.2d 861 (7th Cir. 1977) (attache case), vacated on other grounds, 571 F.2d (7th Cir. 1978).

CONCLUSION

For the reasons stated herein, respondent respectfully urges that this Court deny the petition for a writ of certiorari.

DATED: November 10, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

PETER R. SILTEN
Deputy State Public Defender

Counsel for Respondent

PRS:lbl

APPENDIX A

FIRST APPELLATE DISTRICT
DIVISION THREE

COPY

Almon Boyd Smith, Petitioner, vs. Alameda County Superior Court, Respondent, People of the State of California, Real Party in Interest.	No. 1/Civil 50184 ALTERNATIVE WRIT OF MANDATE

The People of the State of California to the Superior Court of the State of California, _____ County of Alameda, Greeting:

The petition for a writ of mandate on file herein having been considered and good cause appearing for the issuance of this alternative writ of mandate,

WE DO COMMAND YOU, forthwith upon receipt of this writ, to vacate your order of July 16, 1980, in Alameda County Superior Court Action No. 67239, People v. Smith,

or in the alternative that you show cause before Division Three of this Court on Tuesday, October 21, 1980 at 10:00 a.m. in its courtroom in the State Building, San Francisco, California, why you have not done so.

The written return, if any, to this alternative writ is to be served and filed on or before October 2, 1980.

Witness the Honorable Clinton W. White, Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division Three.

Attest my hand and the Seal of this Court this 11th day of September, 1980.

SEAL

Clifford C. Porter Clerk

By _____
Deputy Clerk

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

NO. 80-254

RECEIVED
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SUPREME COURT, U.S.

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALMON BOYD SMITH,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

PETER R. SILTEN, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1390 Market Street, Suite 425 in the City and County of San Francisco, State of California; that on November 10, 1980, he served a true copy of the attached Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

George M. Deukmejian
Attorney General of the State of California
6000 State Building
San Francisco, California 94102

D. Lowell Jensen
District Attorney, Alameda County
1225 Fallon Street
Oakland, California 94612

Rene C. Davidson
County Clerk, Alameda County
1225 Fallon Street
Oakland, California 94612

Clerk, California Court of Appeal
State Building
455 Golden Gate Avenue
San Francisco, California 94102

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

PETER R. SILTEN